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Louisiana Oil & Gas Update

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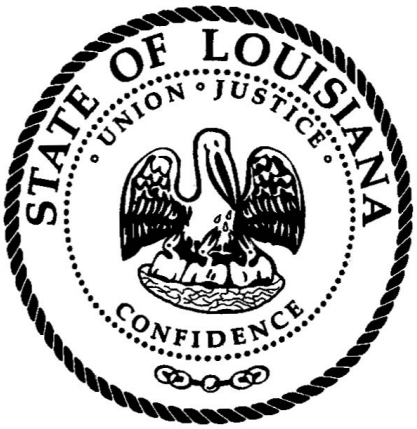
LOUISIANA OIL AND GAS UPDATE



By: Keith Hall

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I. Lease Disputes

A. *Calculation of Lease Royalties*

In *Culpepper v. EOG Resources, Inc.*, EOG Resources, Inc. was the successor-in-interest to the lessee's rights under a mineral lease that required the lessee to pay a royalty on natural gas, calculated at three-sixteenths of the "amount realized by [l]essee computed at the mouth of the well."[1] EOG produced natural gas and sold it at a location away from the well. In calculating the royalty it paid to the lessors, EOG used the "work back" or "net back" method, in which transportation costs incurred by the operator were deducted from the sales price of the natural gas, with the royalty being paid on the difference.[2] The lessors brought suit, arguing that deduction of transportation costs was improper.[3] The district court agreed and entered judgment for the lessors, but the Louisiana Second Circuit reversed.[4] Citing prior jurisprudence, the appellate court stated that deduction of post-production costs is proper when calculating a royalty that is based on the "amount realized . . . at the mouth of the well."[5]

B. *Commencement of Operations*

In *Cason v. Chesapeake Operating, Inc.*, Mr. and Mrs. Cason granted a mineral lease that contained a five-year primary term that expired on May 31, 2010.[6] The lease contained a clause stating that the lease would remain in effect beyond the primary term for as long as the lessee was "engaged in operations for drilling."[7] After multiple assignments and partial assignments, a portion of the lease was held by a subsidiary of Chesapeake Operating.[8] The lessees did not spud a well or obtain a drilling permit before the expiration of the primary term, but prior to the end of the primary term, Chesapeake took steps in preparation for drilling.[9] For example, it conducted a survey of a drill site, staked an area for the well pad, and began to clear trees from the area.[10] Several weeks after the end of the primary term, Chesapeake spudded a well at the site and eventually completed the well.[11]

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1. *See* Culpepper v. EOG Res., Inc., 92 So. 3d 1142, 1143 (La. Ct. App. 2012).
2. *See* Patrick H. Martin & Bruce M. Kramer, Manual of Oil & Gas Terms 597–98, 1067–68 (14th ed. 2009) (defining "netback method" and "work-back valuation method").
3. *Culpepper*, 92 So. 3d at 1143.
4. *Id.* at 1142.
5. *Id.* at 1143.
6. Cason v. Chesapeake Operating, Inc., 92 So. 3d 436, 438 (La. Ct. App. 2012).
7. *Id.*
8. *Id.* at 437.
9. *Id.* at 439.
10. *Id.*
11. *See id.* at 438–39.

But Mr. and Mrs. Cason granted a mineral lease to another company for the same land and filed suit against Chesapeake and several other defendants that held an interest in the original lease, seeking a judgment that the original lease had terminated.[12] The Casons contended that Chesapeake's activities prior to the expiration of the primary term did not constitute "operations for drilling" and therefore had not maintained the original lease beyond the primary term.[13] The district court disagreed and entered judgment for the defendants.[14] The Louisiana Second Circuit affirmed.[15] The appellate court cited numerous prior cases in which Louisiana courts have held that spudding a well is not necessary in order for a company to be engaged in "drilling operations" or for the company to have commenced "drilling operations."[16] Instead, it is sufficient that a company has begun significant work in preparation for drilling, such as moving lumber and equipment onsite, building board roads, and staking a site.[17]

The Second Circuit stated that work of the type performed by Chesapeake prior to the expiration of the primary term is sufficient to constitute "operations for drilling" if the work is done in good faith, without undue delay, and that the work eventually leads to the drilling and completion of a well.[18] Whether an operator is in good faith is judged in large part by its actions, such as whether it diligently works to complete a well.[19] Here, Chesapeake had completed the well without undue delay.[20] Accordingly, the Second Circuit held that the district court had not abused its discretion in holding that Chesapeake's acts of surveying, staking, and clearing were sufficient to constitute "operations for drilling" and to maintain the lease.[21]

C. *Mineral Code Article 207 Attorney Fees*

In *Adams v. JPD Energy, Inc.*, Mr. and Mrs. Adams agreed to grant a mineral lease to JPD Energy.[22] They signed a lease form that provided for a one-eighth royalty, but both the Adamses and JPD later

12. *Id.* at 438.
13. *Id.*
14. *Id.* at 440.
15. *Id.* at 446.
16. *Id.* at 442.
17. *See id.* at 441–42.
18. *Id.* at 442.
19. *See id.* at 441.
20. *Id.* at 443.
21. *See id.*
22. *See* Adams v. JPD Energy, Inc., 46 So. 3d 751, 752 (La. Ct. App. 2010). *Adams* involved a dispute regarding the validity of a lease and was decided prior to the time period covered in this Article. The case is discussed briefly as background for an attorney's fee dispute involving the same parties, which was decided during the period covered in this Article. *See* Adams v. JPD Energy, Inc., 87 So. 3d 161 (La. Ct. App. 2012), *writ denied*, 89 So. 3d 1194 (La. 2012).

stated that the reference to a one-eighth royalty was erroneous.[23] The Adamses sued to rescind the lease based on fraud or error, claiming that the parties had agreed to a one-fourth royalty.[24] JPD asked the court to reform the lease, stating that the parties had agreed to a royalty of one-fifth, not one-fourth as claimed by the Adamses.[25] The district court held that the lease was null and void because the parties had failed to reach a "meeting of the minds."[26] The Louisiana Second Circuit affirmed.[27]

After holding that the lease was unenforceable, the trial court awarded attorney's fees to the Adamses, relying on Mineral Code article 207,[28] which authorizes attorney's fees if a lessee fails to timely acknowledge the "expiration" of a lease.[29] The Second Circuit reversed the attorney's fee award, holding that the nullity of a lease is not the same as the "expiration" of a lease because a mineral lease that is declared null is deemed never to have existed.[30]

II. Units for Ultra Deep Formations

Like other states, Louisiana generally applies the rule of capture.[31] But, as in some other states, Louisiana law authorizes a regulatory agency—in Louisiana, it is the Office of Conservation ("Office")—to enter compulsory unitization orders that modify the rule of capture.[32] Several statutes grant unitization authority to the Office for various situations.

For example, Louisiana Revised Statute 30:9 authorizes the Office to create drilling units and states that "[a] drilling unit, as contemplated [therein], means the maximum area that can be efficiently and economically drained by one well."[33] Louisiana Revised Statute 30:5 authorizes the Office to order pool-wide or field-wide units under certain circumstances, if at least 75% of the royalty owners in the area

23. *Adams*, 46 So. 3d at 753.
24. *Id.*
25. *Id.*
26. *Id.* at 754.
27. *Id.* at 756.
28. La. Rev. Stat. Ann. § 31:207 (2000). This provision under title 31 may be referred to as article 207 of the Mineral Code. *See* La. Rev. Stat. Ann. § 31:1 (2000).
29. *See* Adams v. JPD Energy, Inc., 87 So. 3d 161, 164 (La. Ct. App. 2012), *writ denied*, 89 So. 3d 1194 (La. 2012).
30. *Id.*
31. *See, e.g.*, Barnard v. Monongahela Natural Gas Co., 65 A. 801, 802 (Pa. 1907); Kelly v. Ohio Oil Co., 49 N.E. 399, 401 (Ohio 1897); La. Rev. Stat. Ann. §§ 31:8, 31:14 (2000) (codifying the substance of the rule of capture); *see also* Frey v. Amoco Prod. Co., 603 So. 2d 166, 178 (La. 1992) (referring to "rule of capture" by name).
32. *See* La. Rev. Stat. Ann. § 30:9 (2007); La. Rev. Stat. Ann. § 30.10(A) (West, Westlaw through 2012 Reg. Sess.). In Louisiana, forced pooling and compulsory unitization orders typically are issued simultaneously, and they often are referenced by courts and practitioners simply as "unitization" orders.
33. § 30:9.

consent to unitization.[34] Louisiana Revised Statute 30:5.1 authorizes the Office to order pool-wide units, without the need for consent of 75% of the owners in the area, but only if the pool is found at a depth of at least 15,000 feet.[35]

Act 743 of the 2012 Regular Session of the Louisiana Legislature grants the Office additional unitization authority by enacting a new section to the existing Louisiana Revised Statute 30:5.1.[36] The new section authorizes the Commissioner of Conservation ("Commissioner") to declare units up to 9,000 acres in size for "ultra deep structures" that are anticipated to be encountered at a minimum depth of 22,000 feet, with such units to be served by one or more unit wells.[37] The legislation defines "structure" as "a unique geologic feature that potentially traps hydrocarbons in one or more pools or zones."[38]

Before entering such an order, the Commissioner must find the following based on evidence presented at a public hearing: the order is reasonably necessary to prevent waste and the drilling of unnecessary wells, and to encourage the development of the ultra deep structure; the operations proposed by the party seeking unitization are economically feasible; sufficient evidence exists to establish the limits of the ultra deep structure; and the party seeking the unitization has submitted a reasonable development plan that states the number of wells that the party intends to drill, an estimated schedule for drilling, and the anticipated depth for each well.[39] Each interested person is entitled to review all the information submitted, including any seismic data submitted to establish the limits of the ultra deep structure.[40]

III. Risk Fee Statute

When a compulsory drilling unit is created, the proceeds from oil or gas produced from a unit well generally will be shared by all persons holding mineral rights in the unit.[41] This rule can lead to a problem when various tracts of land within the unit are subject to mineral leases held by different lessees. Suppose one lessee–operator is willing to drill a well, but another lessee is unwilling to participate by paying a share of drilling costs. Absent some provision to address this issue, there can be one of two results—either the non-participant's decision leads to a stalemate, and no well is drilled or the operator

34. La. Rev. Stat. Ann. § 30:5 (2007).

35. La. Rev. Stat. Ann. § 30:5.1 (West, Westlaw through 2012 Reg. Sess.).

36. The Acts of the Louisiana Legislature may be found at the legislature's website. The URL for that site is http://www.legis.state.la.us/.

37. § 30:5.1(B) (codifying this new section).

38. Drilling Permits, No. 795, sec. 1, § 28(2), 2012 La. Sess. Law Serv. 795 (West).

39. *Id.*

40. § 30:5.1(B)(7).

41. *See* La. Rev. Stat. Ann. § 30:9 (2007).

pays all the costs of drilling and thus bears all the risk of a dry hole. Several states, including Louisiana, address this by Risk Fee Statutes.

Louisiana's Risk Fee Statute[42] allows an operator to propose a well to any other mineral lessees holding leases in the area.[43] The operator makes the proposal by sending specified information regarding the proposed well to the other lessees, who have thirty days after receiving the proposal to give a reply stating whether they consent to "participate" in the well.[44] If a lessee timely agrees to participate, it becomes obligated to pay its proportionate share of drilling costs and will be entitled to its proportionate share of any proceeds from the well, starting with the first drop of product.[45] On the other hand, if the lessee does not timely agree to participate, it will not be liable for any costs in the event of a dry hole.[46] The non-participating lessee retains its right to receive its proportionate share of production from the proposed well, but it does not begin to share in such production until the proceeds from production are sufficient to pay for the costs of drilling and operating the well three times over.[47]

Act 743 amends Louisiana's Risk Fee Statute to require the operator of a unit well to pay certain funds to the non-participating lessee from the start of production, during the time that a non-participating lessee would not have been entitled to receive any proceeds under the pre-Act 743 version of the Risk Fee Statute.[48] Namely, Act 743 requires the operator to pay the non-participating lessee a portion of the proceeds of production sufficient to cover any lease royalties or overriding royalties owed by the nonparticipating lessee on the production.[49]

IV. PRE-ENTRY NOTICE TO SURFACE OWNERS

Louisiana does not recognize mineral estates that create a permanent separation of surface rights and mineral rights, but the state recognizes mineral servitudes.[50] Mineral servitudes have many of the characteristics of a mineral estate,[51] but a mineral servitude generally

42. LA. REV. STAT. ANN. § 30:10(A)(2)(a)(i) (West, Westlaw through 2012 Reg. Sess.).

43. *Id.* § 30:10(A)(2).

44. *Id.* § 30:10(A)(2)(a)(ii).

45. *Id.* § 30:10(A)(2)(a)(i).

46. *Id.* § 30:10(A)(2)(b)(i).

47. *Id.* § 30:10(A)(2)(b) (stating that an operator may recover its costs plus a risk fee equal to twice its costs).

48. Pooling of Oil and Gas Wells, No. 743, 2012 La. Sess. Law Serv. 743 (West) (amending § 30:10(A)(2)(b)(ii)).

49. *Id.* at sec. 1, § 10(A)(2)(b)(ii) (codified as amended at LA. REV. STAT. ANN. § 30:10(A)(2)(b)(ii)).

50. Frost-Johnson Lumber Co. v. Salling's Heirs, 91 So. 207, 245 (La. 1920); Wemple v. Nabors Oil & Gas Co., 97 So. 666, 668–69 (La. 1923).

51. LA. REV. STAT. ANN. §§ 31:21 to 31:23 (2007).

will be extinguished by prescription of nonuse if it ever goes unused for a ten-year period.[52]

A mineral servitude owner generally has a right to reasonable use of the surface for the purpose of exercising his servitude rights to explore for or produce minerals.[53] The servitude owner generally does not need the landowner's permission to enter the property, but common courtesy suggests that a servitude owner generally should give the landowner notice before he enters the property.

Under certain circumstances, legal notice will now be required. Act 795 enacts Louisiana Revised Statute 30:28(I), which requires that operators give notice to landowners at least thirty days prior to entering their land to drill.[54] The legislation does not require notice if the operator has a contract with the landowner, the operator is entering the property only for pre-drilling activities (such as surveying), or the operator is drilling an additional well from an existing well pad and the operator is not expanding the pad or the access road to the pad.[55] For purposes of the pre-entry notice requirement, "surface owner" is defined as the person or persons shown as the owner on the rolls of the local property assessor.[56]

The Commissioner may grant a waiver of the thirty-day notice if waiting thirty days to enter the land would result in termination of a lease.[57] The Commissioner may also waive the thirty-day requirement in emergency circumstances.[58]

V. LANDMEN AND UNAUTHORIZED PRACTICE OF LAW ALLEGATIONS

In *Collins v. Godchaux*, Collins was a landman who contracted to manage the mineral interests of two landowners in return for a specified portion of any mineral revenue they received.[59] After the landowners entered a settlement that resulted in an existing lease being amended and five new leases being executed, Collins and the landowners disagreed about Collins's right to a portion of the revenue the landowners received from the new leases and the amended lease.[60] Collins brought suit for the money he believed he was owed.[61] The landowners filed a counterclaim, asserting that the work performed by Collins constituted the unauthorized practice of law, and therefore

52. LA. REV. STAT. ANN. § 31:27 (2007).
53. §§ 31:21, 31:23.
54. Drilling Permits, No. 795, 2012 La. Sess. Law Serv. 795 (West) (enacting LA. REV. STAT. ANN. § 30:28(I) (West, Westlaw through 2012 Reg. Sess.)).
55. *Id.* at sec. 1, § 28(I)(1)(c), (e)–(f) (codified at § 30:28(I)(1)(c), (e)–(f)).
56. *Id.* at sec. 1, § 28(I)(2) (codified at § 30:28(I)(2)).
57. *Id.* at sec. 1, § 28(I)(1)(d) (codified at § 30:28(I)(1)(d)).
58. *Id.*
59. Collins v. Godchaux, 86 So. 3d 831, 832 (La. Ct. App. 2012).
60. *Id.* at 833.
61. *Id.*

they were entitled to a cancellation of their contract with Collins, as well as a reimbursement of the money they had already paid him.[62]

In support of their counterclaim, the landowners noted that Collins had negotiated contracts on their behalf.[63] They also alleged that he had advised them about their legal rights.[64] The district court agreed.[65] It held that Collins had engaged in the unauthorized practice of law and that his contract with the landowners was void.[66] But the court held that the landowners' "unclean hands" barred their recovery of the money they already had paid to Collins.[67]

The Louisiana Third Circuit concluded that Collins had not given legal advice.[68] Further, the Third Circuit concluded, citing to prior Louisiana Supreme Court opinions, that tasks which historically have been performed by landmen do not constitute the "unauthorized practice of law," even if some of those tasks appear to fit within Louisiana's statutory definition of that phrase.[69] Because the tasks performed by Collins were the types of tasks traditionally performed by landmen, he had not engaged in the unauthorized practice of law.[70]

VI. Mandatory Disclosure of Hydraulic Fracturing Fluid Composition

A. *Regulation Mandating Disclosure*

As reported in Texas Wesleyan's 2011 Oil & Gas Survey, the Louisiana Department of Natural Resources ("DNR") proposed a new regulation that would require operators to disclose information about the water used in hydraulic fracturing.[71] The regulation, which went into effect on October 20, 2011, requires operators to disclose on a well-by-well basis:

- the volume of hydraulic fracturing fluid used;
- the types of additives used (for example, biocides, corrosion inhibitors, friction reducers, etc.), as well as the volume of each type;
- the trade name and supplier of each additive; and
- a list of any chemical compounds contained in the additives that qualify as hazardous under certain federal regu-

62. *Id.* at 834.
63. *Id.* at 835.
64. *Id.*
65. *Id.* at 834.
66. *Id.*
67. *Id.*
68. *Id.* at 839.
69. *Id.* at 838–39; La. Rev. Stat. Ann. § 37:212(A)(1)–(2) (Supp. 2012) (defining "unauthorized practice of law").
70. *Collins*, 86 So. 3d at 838–39.
71. La. Admin. Code tit. 43, pt. XIX § 118 (2011).

> lations, along with the maximum concentration of each compound.[72]

The new regulation, found at Louisiana Administrative Code 43.XIX.118, requires that the operator either include this information with the Well History Report, which must be filed with the Office of Conservation within twenty days after completion of the well, or submit a statement that the information is posted on the FracFocus website that is operated by the Groundwater Protection Council.[73] If the identity of the chemical compound is a trade secret, the operator is excused from identifying the compound but is required to identify the chemical family to which the compound belongs.[74]

B. *Statute Mandating Regulation*

The legislature enacted Act 812, which directs the Office to draft regulations for mandatory disclosure of hydraulic fracturing fluid composition—something that the Office had done even before Act 812 was passed.[75] The statute mandates that the regulations require disclosure within twenty days after completion of the hydraulic fracturing operations, whereas the existing regulations require disclosure within twenty days of completion of the well.[76] Otherwise, Act 812 appears to mandate regulatory requirements consistent with the existing regulations in Louisiana Administrative Code 43.XIX.118.[77]

VII. Acquisition of Property for Pipelines by Eminent Domain

Federal statutes and the statutes of many states provide procedures for private companies to acquire property by eminent domain for certain purposes, such as the construction of natural gas pipelines. The owners from whom such property is acquired are entitled to compensation, but the process can proceed very quickly, and property owners generally cannot block an acquisition. The process is called "condem-

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72. *Id.*

73. *Id.*; *see also* La. Admin. Code tit. 43, pt. XIX § 105 (2011) (setting the twenty-day deadline for filing the Well History Report).

74. La. Admin. Code tit. 43, pt. XIX § 118.

75. Hydraulic Fracturing, No. 812, 2012 La. Sess. Law. Serv. 812 (West) [hereinafter Hydraulic Fracturing, No. 812]; La. Admin. Code tit. 43, pt. XIX § 118.

76. *Compare* La. Admin. Code tit. 43, pt. XIX § 118, *with* Hydraulic Fracturing, No. 812.

77. La. Admin. Code tit. 43, pt. XIX § 118.

nation" under federal law[78] and the law of many states,[79] but typically is called "expropriation" in Louisiana.[80]

During its 2012 Regular Session, the Louisiana Legislature enacted Act 702, which was signed into law by Governor Jindal.[81] The Act amends existing statutes regarding expropriation, including Louisiana Revised Statutes 19:2 and 19:2.2.[82] The amendments leave the power of expropriation intact and attempt to ensure that the process of expropriation can still proceed relatively quickly, but the amendments also take modest steps to protect landowners from unfairness in the process.[83]

For example, prior law allowed a company that had the power of expropriation (an "expropriating authority") to file a petition for expropriation whenever "a price cannot be agreed upon with the owner."[84] Prior law did not require the expropriating authority to negotiate with the landowner in good faith in an attempt to reach an agreement with the landowner without resort to an expropriation action.[85] Act 702 requires a company to make a "good faith" attempt to reach an agreement with a property owner regarding compensation prior to filing an expropriation action.[86] In those negotiations, the company must offer compensation at least equal to the lowest appraised value of the property or property rights to be acquired.[87]

Prior law did not require an expropriating authority to give a landowner a reasonable period to consider the authority's offer to purchase the property.[88] Act 702 provides that, at least thirty days before filing an expropriation action, the expropriating authority must send a letter to the property owner by certified mail, stating (1) the legal basis by which the company could exercise expropriation authority; (2) the purpose and conditions of the proposed acquisition of property; and (3) the compensation the company proposes to pay.[89] With the letter, the authority also must include a copy of all appraisals that the company has obtained of the property to be acquired; a plat

78. *See, e.g.*, Mars. & Ne. Pipeline, L.L.C. v. Deccoulas, 146 F. App'x 495, 496 (1st Cir. 2005); *see also* 15 U.S.C. § 717f (2006).

79. *See, e.g.*, TEX. GOV'T CODE ANN. § 2206.001(c)(7)(a) (West 2008 & Supp. 2012); TEX. GOV'T CODE ANN. § 2206.051 (Supp. 2012).

80. *See* LA. REV. STAT. ANN. § 19:2 (West, Westlaw through 2012 Reg. Sess.).

81. Press Release, La. Office of the Governor, Governor Jindal Signs Bills and Issues Vetoes(June 15, 2012), http://www.gov.louisiana.gov/index.cfm?md=newsroom &tmp=detail&articleID=3480.

82. *See* Expropriation, No. 702, 2012 La. Sess. Law Serv. 702 (West).

83. *See id.*

84. § 19:2.

85. *See id.*; *see also* LA. REV. STAT. ANN. § 19:2.2 (West, Westlaw current through 2012 Reg. Sess.).

86. *See* Expropriation, No. 702.

87. *See id.*

88. *See* § 19:2; *see also* § 19:2.2.

89. Expropriation, No. 702.

showing the boundaries of the proposed acquisition; a description of any proposed above-ground facilities that the company proposes to place on the property and the location where the facilities will be located; and a statement of the "considerations for the proposed route or area to be acquired."[90]

VIII. CONTAMINATION LITIGATION (A/K/A "LEGACY LITIGATION")

Since the Louisiana Supreme Court decision in *Corbello v. Iowa Production*,[91] plaintiffs have filed a large number of "legacy litigation" actions, asserting that their property was contaminated by past oil and gas activity.[92]

As the number of those suits began to multiply, people began to express concern that plaintiffs could receive large money judgments that were based on the estimated cost of remediating property, but that plaintiffs were not required to spend the money on remediation.[93] Thus, the contamination might remain a threat to the environment. And, if a plaintiff failed to use a money judgment to clean-up his property, a company that already had paid that judgment might face the possibility of having to pay again—this time, for a clean-up ordered by regulators.[94] Another concern was that plaintiffs' experts and defendants' experts often expressed very different opinions about what type of clean-up was appropriate, and jurors and judges who lacked expertise in environmental science were being called upon to choose between such competing testimony.

In its 2006 Regular Session, the Louisiana Legislature enacted Act 312, which addresses these two concerns.[95] It established a process by which the Louisiana Office of Conservation would hold hearings and issue its opinion regarding what clean-up was appropriate.[96] Al-

90. *Id.*

91. Corbello v. Iowa Prod., 850 So. 2d 686 (La. 2003).

92. In *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 238 n.1 (La. 2010), the Louisiana Supreme Court stated: "Legacy litigation" refers to hundreds of cases filed by landowners seeking damages from oil and gas exploration companies for alleged environmental damage in the wake of this Court's decision in *Corbello v. Iowa Production*. These types of actions are known as "legacy litigation" because they often arise from operations conducted many decades ago, leaving an unwanted "legacy" in the form of actual or alleged contamination. *See* Loulan Pitre, Jr., *"Legacy Litigation" and Acts 312 of 2006*, 20 TUL. ENVTL. L.J. 347, 347–49 (2007).

93. In her concurring opinion in *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, Justice Johnson noted that the legislature's intent in enacting "Act 312" was to require that damages awards be spent on clean-up. 998 So. 2d 16, 39 (La. 2008) (Johnson, J., concurring).

94. Although the concern about double exposure heightened after the number of legacy litigation cases increased, the concern had been expressed earlier, such as in the concurring opinion of Justice Lemmon in *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475, 486 (La. 1991) (Lemmon, J., concurring).

95. Remediation, No. 312, 2006 La. Sess. Law Serv. 312 (West) (codified at LA. REV. STAT. ANN. § 30:29 (West, Westlaw through 2012 Reg. Sess.)).

96. *Id.*

though parties could offer their own remediation plans, the Office of Conservation's plan might provide some guidance to the judge or jury.[97] Second, assuming a defendant was found liable and that it paid a money judgment, the money would have to be spent on clean-up.[98] But a number of other issues remained unresolved, some of which were spawned by Act 312 itself.

A. *Act 779—Reforms Relating to Procedure and Admissions of Liability*

During its 2012 Regular Session, the Louisiana Legislature adopted two bills to address legacy litigation issues.[99] One of the issues addressed by the legislation was one that sometimes has been disputed by parties in legacy litigation—whether a party has the right to subpoena employees of the Office of Conservation or Department of Natural Resources in order to compel testimony about their work in helping the Office devise a recommendation for a remediation plan.[100] Act 779 enacts a new section of Louisiana Revised Statute 30:29 that authorizes parties in legacy litigation to subpoena any Office "employee, contractor, or representative" for testimony at a deposition or trial if that person was involved in formulating the remediation plan recommended by the Office.[101]

Another issue of controversy is the large number of defendants named in legacy lawsuits. Plaintiffs often name many—sometimes dozens—companies and individuals as defendants in legacy litigation,[102] and in some cases, the plaintiffs may not have evidence to link some of the defendants to the alleged contamination. Act 779 establishes a procedure whereby a defendant may request a hearing at which the plaintiff has the initial burden of introducing evidence of environmental damages.[103] If the plaintiff introduces such evidence, the defendant has the burden of establishing the lack of a genuine issue of material fact regarding whether the defendant is legally responsible for the contamination.[104]

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97. *See id.*

98. *Id.*

99. *See* Remediation of Oilfield Sites and Exploration Sites and Production Sites, No. 779, 2012 La. Sess. Law Serv. 779 (West); Liability for Environmental Damage, No. 754, 2012 La. Sess. Law Serv. 754 (West).

100. *See, e.g.*, Tensas Poppadoc, Inc. v. Chevron U.S.A., Inc., 49 So. 3d 1020, 1024–26 (La. 2010), *writ granted and case remanded*, 58 So. 3d 473 (La. 2011).

101. *See* Remediation of Oilfield Sites and Exploration Sites and Production Sites, No. 779 (amending LA. REV. STAT. ANN. § 30:29 (West, Westlaw through 2012 Reg. Sess.)).

102. For example, the plaintiffs named "[a]pproximately 25 defendants." M.J. Farms, Ltd. v. Exxon Mobil Corp., 998 So. 2d 16, 20 n.2 (La. 1991).

103. Remediation of Oilfield Sites and Exploration Sites and Production Sites, No. 779.

104. *See id.*

If a defendant establishes the absence of a genuine issue of material fact, the court must dismiss that defendant without prejudice.[105] If another party later discovers evidence that the dismissed defendant may have liability, the party may cause the dismissed defendant to be rejoined to the litigation.[106] If the dismissed defendant is never rejoined, the defendant is entitled to a dismissal with prejudice when the litigation ends in a final, non-appealable judgment.[107]

Louisiana has a relatively short limitations period for tort claims—one year.[108] Although the running of the limitations period may be suspended by the discovery rule, Louisiana jurisprudence provides that the limitations period begins to run as soon as a plaintiff knows facts that would cause a reasonable person to inquire about potential harm, even if the plaintiff does not yet have facts sufficient to point to a particular defendant.[109] Act 779 provides running of the limitations period is suspended for one year if a person who suspects his property is contaminated submits to the Office of Conservation a "notice of intent to investigate" that meets certain requirements.[110]

Act 779 also contains other provisions. For example, the Act prohibits parties from engaging in ex parte communications with the Office of Conservation during the time that the Office is considering proposed remediation plans.[111] The Act authorizes the Office to issue compliance orders for remediation after a person admits liability or is found liable for contamination.[112] Finally, if a party admits liability, the Act requires that party to waive any contractual indemnification rights it might have for any punitive damages arising from the contamination.[113]

105. *See id.*
106. *See id.*
107. *See id.*
108. *See* LA. CIV. CODE ANN. art. 3492 (2011) (one-year prescriptive period for delictual actions); *see also* LA. CIV. CODE ANN. art. 3493 (2011). A "delictual action" is a tort action. Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co., 290 F.3d 303, 311 (5th Cir. 2002). In Louisiana, limitations periods that correspond to what many jurisdictions would call a "statute of limitations" are called a period of "liberative prescription." *See* LA. CIV. CODE ANN. art. 3447 (2007).
109. Marin v. Exxon Mobil Corp., 48 So. 3d 234, 245-46 (La. 2010). Under Louisiana jurisprudence, the "discovery rule" is one of four categories of *contra non valentem*, a doctrine which can suspend the running of liberative prescription. *Id.*
110. *See* Remediation of Oilfield Sites and Exploration Sites and Production Sites, No. 779.
111. *Id.*
112. *Id.*
113. *Id.*

B. *Act 754—Additional Provisions Relating to Procedure and Admissions of Liability*

The other legislation relating to legacy litigation was Act 754, which enacts Louisiana Code of Civil Procedure articles 1552 and 1563.[114] Parties in legacy litigation sometimes have disputes regarding testing and inspection of allegedly contaminated property. Act 754 permits any party, or the Louisiana Department of Natural Resources ("LDNR"), to request that the court direct attorneys for the parties in legacy litigation to appear before LDNR to develop an environmental management order that authorizes all parties to have access to the property for inspection and testing and establishes time periods and protocols for testing and inspection.[115] Such an order must provide that any test results must be disclosed to all parties and LDNR within thirty days.[116] If the test results are not disclosed, the party that failed to disclose the results is barred from offering the results into evidence.[117]

Another issue has been whether defendants could pay for a remediation or admit liability for contamination without admitting liability for other damages claimed by plaintiffs. Act 754 permits defendants to admit responsibility for implementing a plan to evaluate, and if necessary, remediate all or a portion of any contamination without admitting liability for other alleged damages.[118] Once a party admits liability for remediation, the matter is referred to LDNR for a public hearing on the most feasible plan for a remediation.[119]

C. *Subsequent Purchaser Doctrine*

When a person purchases property that contains contamination that is not readily apparent, and the seller does not expressly assign to the buyer any claims against third parties for damages arising from the contamination, Does the buyer have a cause of action against third parties? Under the "subsequent purchaser doctrine," the cause of action against third parties would remain with the seller, and the buyer would not have such a cause of action. Until recently, it was unclear whether the subsequent purchaser doctrine applies under Louisiana law.[120]

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114. Liability for Environmental Damage, No. 754, 2012 La. Sess. Law Serv. 754 (West) (amending LA. CODE CIV. PROC. ANN. art. 1552, 1563).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *See* Marin v. Exxon Mobil Corp., 48 So. 3d 234, 256 n.18 (La. 2010). The Court noted that it had granted review in part to address whether the subsequent purchaser doctrine applies under Louisiana law, but that the court ultimately had not reached the issue because it had resolved the case on other grounds. *Id.*

In *Eagle Pipe & Supply Co. v. Amerada Hess Corp.*, the Louisiana Supreme Court resolved the question, at least with respect to tort claims, by holding that the subsequent purchaser doctrine applies.[121] In *Eagle Pipe*, the plaintiff purchased land that previously had been used for the removal of scale from the interior of oilfield piping.[122] Such scale sometimes contains naturally occurring radioactive material ("NORM") that originates from the formations from which oil or gas is produced. Subsequent to the purchase, the Louisiana Department of Environmental Quality performed an inspection and discovered the land was contaminated with NORM.[123] The contamination had not been readily apparent.[124]

The plaintiff brought a claim against the seller.[125] The plaintiff also brought claims against various trucking companies that allegedly had transported pipes to the site and against several oil and gas companies that allegedly owned the pipes that were cleaned at the site.[126] The Court held that a cause of action for contamination generally belongs to the person who owned the land at the time of contamination, and, absent an assignment of the cause of action, a subsequent purchaser has no right of action against third parties, such as the trucking companies and oil and gas companies that might have fault for the contamination.[127] The Court expressly noted, however, that it was not expressing an opinion on whether a similar result would apply in a case involving defendants that were parties to a mineral lease relating to the contaminated land.[128]

D. *Extent of Remediation Damages*

In *Louisiana v. Louisiana Land & Exploration Co.*, the State of Louisiana and the Vermilion Parish School Board filed three lawsuits, seeking remediation of certain public properties that the plaintiffs alleged had been contaminated by the oil and gas activity of UNOCAL and other defendants.[129] UNOCAL admitted responsibility. UNOCAL then filed a motion for a partial summary judgment, stating that Act 312 limited its liability to the amount of money needed to fund a "feasible plan" approved by the court pursuant to Louisiana Revised

121. Eagle Pipe & Supply Co. v. Amerada Hess Corp., 79 So. 3d 246 (La. 2011).

122. *Id.* at 253–54.

123. *Id.* at 254.

124. *Id.* at 257.

125. *Id.* at 253.

126. *Id.*

127. *Id.* at 283.

128. *See id.* at 281 n.80.

129. *See* Louisiana v. La. Land & Exploration Co., 85 So. 3d 158 (La. Ct. App.), *writ granted*, 92 So. 3d 340 (La. 2012).

Statute 30:29.[130] The court granted the motion, and the plaintiffs appealed.[131]

The Third Circuit examined the language of Revised Statute 30:29, including 30:29(H), which states in part:

> This Section shall not preclude an owner of land from pursuing a judicial remedy or receiving a judicial award for private claims suffered as a result of environmental damage, except as otherwise provided in this Section. Nor shall it preclude a judgment ordering damages for or implementation of additional remediation in excess of the requirements of the plan adopted by the court pursuant to this Section as may be required in accordance with the terms of an express contractual provision.[132]

The "plan adopted by the court" refers to a plan to remediate the property to regulatory standards.

Some readers of the statute might conclude that, because the statute expressly allows claims for remediation in excess of the regulatory standard whenever a more rigorous remediation is "required [by] an express contractual provision," the statute implies that claims for a more rigorous remediation are not allowed in the absence of an express contractual provision. The Third Circuit concluded, however, that the statute should be interpreted otherwise.[133] The Third Circuit stated that, "La. R.S. 30:29, by its clear language, provides for a landowner to recover damages in excess of those determined in the feasible plan whether they be based on tort or contract law."[134] The Third Circuit therefore reversed the trial court's judgment that the defendants' liability was limited to funding the "feasible plan" approved by the court pursuant to Louisiana Revised Statute 30:29.[135]

The Louisiana Supreme Court has agreed to review the Third Circuit's ruling.[136]

IX. Section 16 Mineral Rights

"Section 16" lands are certain lands formerly owned by the federal government that the United States has transferred to the states for the purpose of supporting public schools.[137] In Louisiana, the state has retained ownership of Section 16 land,[138] but a Louisiana statute provides that each parish school board has the right, in its own name, to grant mineral leases covering any such lands within the school board's

130. *Id.* at 159.
131. *Id.* at 160.
132. *Id.* at 161–62.
133. *Id.* at 162–63.
134. *Id.* at 162.
135. *Id.*
136. Louisiana v. La. Land & Exploration Co., 92 So. 3d 340 (La. 2012).
137. Vermilion Parish Sch. Bd. v. ConocoPhillips Co., 83 So. 3d 1234, 1237–38 (La. Ct. App. 2012).
138. *See id.* at 1238.

parish.[139] Further, a school board has the right to keep all revenue from such leases.[140]

In late 2005 and early 2006, the Vermilion Parish School Board ("VPSB") brought three related actions, asserting that various defendants had underpaid it for royalties owed on mineral leases VPSB had granted for Section 16 lands.[141] The alleged underpayments related to oil produced during the early 1990s, more than ten years before VPSB filed suit.[142] This led to a potential timeliness issue because the general limitations period for royalty claims in Louisiana is three years.[143]

Further, for several years, VPSB had been aware of facts that would make it difficult for VPSB to reasonably assert that the running of the limitations period had been suspended by the discovery rule—indeed, VPSB eventually stipulated in each of the three cases that the discovery rule would not apply and that its royalty claims were time-barred unless the claims were immune from "liberative prescription,"[144] the equivalent of a statute of limitations.[145] The defendants asserted that the claims were not immune from prescription because, although the state itself is immune from prescription, that immunity does not extend to local government or political subdivisions, such as school boards.[146] Each of the three cases was before a different district court judge, and each dismissed the VPSB's claims, holding that the claims were not immune from prescription and that the claims therefore were time-barred.[147]

On appeal, VPSB did not assert that it was entitled to immunity from prescription in its own right.[148] VPSB argued, however, that it

139. LA. REV. STAT. ANN. § 30:152 (2007).

140. LA. REV. STAT. ANN. § 30:154 (Supp. 2012).

141. *See ConocoPhillips*, 83 So. 3d at 1236. The Author of this Article was lead counsel for ConocoPhillips Co., the primary defendant in one of the three cases, and was lead counsel for Louisiana Land & Exploration Co. in one of the other two related cases.

142. *Id.*

143. LA. CIV. CODE ANN. art. 3494 (2011).

144. The fact is not readily apparent from the Louisiana Third Circuit's opinion; but it is stated in a brief filed by ConocoPhillips, and is not disputed in either the Board's original brief or reply brief. *Compare* Brief for Appellee at 1, Vermilion Parish Sch. Bd. v. ConocoPhillips Co., 83 So. 3d 1234 (2012) (No. 11-009999-CA), 2011 WL 5117380, *with* Brief for Appellant at 6, Vermilion Parish Sch. Bd. v. ConocoPhillips Co., 83 So. 3d 1234 (2011) (No. 11-00999-CA), 2011 WL 4826847, *and* Reply Brief for Appellant at 5, Vermilion Parish Sch. Bd. v. ConocoPhillips Co., 83 So. 3d 1234 (2011) (No. 11-00999-CA), 2011 WL 5563588.

145. LA. CIV. CODE ANN. art. 3447 (2011).

146. La. Dep't of Transp. v. City of Pineville, 403 So. 2d 49, 53 (La. 1981).

147. *ConocoPhillips*, 83 So. 3d at 1234 (Judge Everett); *Id.* at 1236 (dismissal of all three cases based on prescription); Vermilion Parish Sch. Bd. v. Amerada Hess Corp., 83 So. 3d 1242, 1242 (La. Ct. App. 2012) (Judge Trahan); Vermilion Parish Sch. Bd. v. UNOCAL Corp., 83 So. 3d 1242, 1242 (La. Ct. App. 2012) (Judge Duplantier).

148. On appeal, the parties' briefing narrowed the issues relating to the VPSB's assertion that it was immune from prescription. *See* Brief for Appellee at 1, Vermil-

was not asserting claims on behalf of itself.[149] VPSB argued that the statute that gives school boards the authority to grant mineral leases in their own names for Section 16 lands does not grant executive rights to school boards.[150] Instead, it merely makes school boards the leasing agents for the state.[151] Moreover, argued VPSB, the statute that gives school boards the right to keep all revenue from Section 16 mineral leases does not grant certain mineral rights to school boards.[152] Instead, it appropriates certain money—the state's Section 16 mineral lease revenue—to school boards.[153] Thus, argued VPSB, the royalty claims asserted by VPSB were royalty claims that belonged to the state, not VPSB, and VPSB was asserting claims on behalf of the state.[154] The Louisiana Third Circuit agreed, holding that the royalty claims were immune from prescription.[155] The appellate court therefore reversed the dismissals of each of the three cases and remanded for further proceedings.[156]

X. Claims by Unleased Owners

In *Wells v. Zadeck*, an unleased mineral rights owner brought a claim for proceeds from production that were owed to him, but which had never been paid to him.[157] The parties disputed the timeliness of the plaintiff's claim.[158] In resolving the issues before it, the Louisiana Supreme Court held that a claim by an unleased owner is a quasi-contractual claim that is governed by the ten-year prescriptive period established by Civil Code article 3499, rather than the three-year prescriptive period established for royalty claims by Civil Code article 3494.[159]

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ion Parish Sch. Bd. v. ConocoPhillips Co., 83 So. 3d 1234 (2012) (No. 11-009999-CA), 2011 WL 5117380. For example, Civil Code article 3494, the provision that imposes a three-year limitations period for royalty claims, states that the article does not apply to royalty claims derived from "state owned property." One might think that the provision might help VPSB given that the state owns Section 16 lands. But the defendants argued that lease royalties derive from ownership of mineral rights, not from mere ownership of land, and that the phrase "state owned property" means state owned mineral rights, not state owned land. By the time the cases were on appeal, VPSB was not seriously contesting the defendants' reading of Civil Code article 3494.

149. *ConocoPhillips*, 83 So. 3d at 1241.

150. *Id.* at 1237.

151. *Id.* at 1240.

152. *Id.* at 1239.

153. *Id.* at 1240.

154. *Id.* at 1237.

155. *Id.* at 1241.

156. *Id.*; Vermilion Parish Sch. Bd. v. Amerada Hess Corp., 83 So. 3d 1242, 1242 (La. Ct. App. 2012); Vermilion Parish Sch. Bd. v. UNOCAL Corp., 83 So. 3d 1242, 1242 (La. Ct. App. 2012).

157. Wells v. Zadeck, 89 So. 3d 1145, 1146 (La. 2012).

158. *Id.* at 1146–50.

159. *Id.*